

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

NOTICE OF PROPOSED RULEMAKING

Workers' Compensation – Audit Regulations

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), exercising the authority vested in her by Labor Code sections 59, 129, 129.5, 133, and 5307.3, proposes to adopt regulations contained in Article 1 of Chapter 4.5, Subchapter 1.5, Division 1, of California Code of Regulations, title 8, sections 10100.2 through 10115.2, relating to Audit Regulations.

PROPOSED REGULATORY ACTION

The Division of Workers' Compensation, proposes to adopt Article 1 of Chapter 4.5, Subchapter 1.5, Division 1, of California Code of Regulations, title 8, commencing with Section 10100.2:

Amended section 10100.2	Definitions.
Amended section 10101.1	Claim File--Contents.
Amended section 10103.2	Claim Log--Contents and Maintenance
Amended section 10104	Annual Report of Inventory
Amended section 10105	Auditing, Discretion of the Administrative Director.
Amended section 10106.1	Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection
Amended section 10106.5	Civil Penalty Investigation.
Amended section 10107.1	Notice of Audit; Claim File Selection; Production of Claim Files; Auditing Procedure.
Amended section 10108	Audit Violations--General Rules.
Amended section 10109	Duty to Conduct Investigation; Duty of Good Faith.
Amended section 10111.1	Schedule of Administrative Penalties for Injuries on or After January 1, 1994.
Amended section 10111.2	Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule.
Amended section 10113.5	Prehearing Conference; Subject Matter; Prehearing Order.
Amended section 10113.4	Written Statement and Supporting Evidence.
Amended section 10113.5	Prehearing Conference; Subject Matter; Prehearing Order.
Amended section 10114.2	Affidavits
Amended section 10115	Appeal of Notice of Compensation Due.
Amended section 10115.1	Appeal of Notice of Penalty Assessment--Filing and Contents
Amended section 10115.2	Appeal of Notice of Penalty Assessment; Conference Process and Delegation of Authority; Notice of Findings, Service

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

**Date: December 15, 2008
Time: 10:00 A.M. to 5:00 P.M., or until conclusion of business
Place: Elihu Harris State Office Building – Auditorium
1515 Clay Street
Oakland, California 94612**

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the State Wide Disability Accommodation Coordinator, Kathleen Estrada, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 P.M., on December 15, 2008**. The Division of Workers' Compensation will consider only comments received at the Division by that time. Equal weight will be accorded to comments presented at the hearing and to other written comments received by 5 P.M. on that date by the Division.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Maureen Gray
Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than **5:00 P.M., on December 15, 2008**.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in her by Labor Code sections 59, 129, 129.5, 133, and 5307.3.

Reference is to Labor Code sections 124, 129, 129.5, 138.6, 138.7, 4061, 4453, 4454, 4550, 4600, 4603.2, 4610, 4621, 4622, 4625, 4636 through 4638, 4639, 4641, 4642, 4650, 4658.5, 4658.6, 4951, 4701 through 4703.5, 4706, 4706.5, 5401, 5401.6, 5402, 5800 and 5814; Unemployment Insurance Code section 2629.1 (e) and (f).

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Labor Code section 129 requires the Administrative Director to conduct audits of insurers, self-insured employers, and third-party administrators to determine if they have met their obligations under the California workers' compensation laws. Audits consist of: a profile audit review (PAR), of which every claims administrator is subject to once every five years; a full compliance audit (FCA), conducted for every claims administrator failing to meet express PAR performance standards and subsequently (within two years) for claims administrators failing to meet express FCA performance standards; and a target PAR or FCA, conducted for claims administrators for which reliable information has been received (for example through benefit notices or from Information and Assistance Officers) indicating that the claims administrator is failing to meet its obligations under the California workers' compensations laws (specifically, obligations under Division 1 or Division 4 of the Labor Code, or promulgated regulations of the Administrative Director). If, as a result of a PAR or FCA, the Administrative Director, through the Division of Workers' Compensation's (DWC) Audit Unit, determines that any compensation, interest, or penalty is due and unpaid to an employee or dependent, the Administrative Director must issue a notice of assessment to the audited claims administrator detailing the owed amount and ordering payment to the entitled employee or dependent. If the owed amount is not paid within 30 days after service of the notice of assessment, the audited claims administrator is liable for reasonable attorney's fees incurred to obtain the amounts due.

Labor Code section 129.5(a) confers authority on the Administrative Director to assess administrative penalties against a claims administrator for: failing to comply with a notice of assessment issued under Labor Code section 129(c) within 15 days of receipt; failing to pay an undisputed indemnity payment or the cost of medical treatment; imposing a charge for an approved vocational rehabilitation plan; or failing to comply with a promulgated rule or regulation. Labor Code section 129.5(b) provides that the Administrative Director shall establish a schedule of violations and the amount of administrative penalty to be imposed for each violation, from \$100 to \$5,000 based on severity of the violation. Imposed administrative penalties must take into consideration the gravity of the violation, the good faith of the claims administrator, the history of previous violations, the frequency of the violations, whether the claims administrator has met the PAR or FCA performance standards, and the size of the claims administrator's audited location. Labor Code section 129.5(c) provides that claims administrators who, following an audit, meet or exceed the PAR or FCA performance standards shall only be required to pay any compensation due and penalties due under Labor Code section 4650(d) (the self-imposed 10% increase for late indemnity payments). Claims administrators who fail to meet the FCA performance standards are subject to a FCA failure penalty schedule.

Further, Labor Code section 129.5 (e) provides that the Administrative Director may assess a civil penalty of up to \$100,000 upon finding, after hearing, that an employer, insurer, or third party administrator knowing committed, or performed with sufficient frequency so as to indicate a general business practice, any of the following: (1) induced employees to accept less than compensation due, or made it necessary for employees to resort to proceedings against the employer to secure compensation; (2) refused to comply with known and legally indisputable compensation obligations; (3) discharged or administered compensation obligations in a dishonest manner; or (4) discharged or administered compensation obligations in a manner as to cause injury to the public or those dealing with the employer or insurer. Upon a second civil penalty, the Administrative Director is required to refer the claims administrator to the Insurance Commissioner or the Director of the Department of Industrial Relations for a determination as to whether the claims administrator's certificate of authority, certificate of consent to self insure, or certificate of consent to administer claims of self-insured employer (as may be applicable) should be revoked..

These proposed regulations implement, interpret, and make specific these sections of the Labor Code as follows:

1. Section 10100.2 - Definitions

This section defines key terms used in these regulations to ensure that the meaning, as used in the regulations, will be clear to the public. Non-substantive citation changes are made to the section for consistency.

Section 10100.2(a) amends the definition of “adjusting location” to provide that for auditing purposes, any separate office or location whose staff includes personnel assigned supervisory responsibility over claims administration may be considered a single adjusting location.

Section 10100.2(b) sets forth the definition of “additional claim file.” The term is defined as a claim file selected for audit in addition to the initial random sample of claims selected. An additional claim file may be a companion claim file, a complaint claim file, a file selected for audit because it was incorrectly designated on the claim log, or a claim file chosen based on criteria relevant to a target audit but for which no specific complaint has been received.

Section 10100.2(g) sets forth the definition of “carve-out program.” The term is defined as either an alternative dispute resolution system established for employees and employers engaged in construction (or other enumerated activities), pursuant to Labor Code section 3201.5, or an alternative dispute resolution system established for other industries pursuant to Labor Code section 3201.7.

Section 10100.2(m) sets forth the definition of “companion claim file.” The term is defined as claim file selected for audit because it is related to a claim file selected for a random or target audit, in that claims were filed by the same injured worker and the Audit Unit cannot ascertain the extent to which benefits have been paid on the initial claim selected for audit without auditing the related claim file.

Section 10100.2(n) amends the definition of “compensation” to include supplemental job displacement benefits. The definition is further amended by the addition of the word “treatment” to clarify that compensation includes medical treatment.

Section 10100.2(o) sets forth the definition of “complaint claim file.” The term is defined as a claim file selected for audit because the Audit Unit has received information alleging the existence of an improper claim handling practice of the kind which, if found, would be subject to the assessment of an administrative penalty, the issuance of a notice of compensation due, or the assessment of a civil penalty.

Section 10100.2(q) amends the definition of “denied claim” by providing that a claim may be deemed a denied claim even if medical treatment was provided and paid under Labor Code section 5402(c). This Labor Code section requires an employer to authorize and provide medical treatment within one working day after an employee files a workers’ compensation claim and to continue to provide such treatment until liability for the claim is accepted or denied.

Section 10100.2(s) sets forth the definition of “first payment of permanent disability indemnity.” The term is defined as the first payment of permanent disability indemnity or a resumed payment following a period when either no payment was required or a lawful notice was issued advising that the benefit was ending.

Section 10100.2(u) sets forth the definition of “first payment of vocational rehabilitation maintenance allowance.” The term is defined as the first payment of vocational rehabilitation maintenance allowance or a resumed payment following a period when either no payment was required or a lawful notice was issued advising that the benefit was ending.

Section 10100.2(v) sets forth the definition of “frequency.” The term is defined as the ratio of the number of claim files with one or more of a specific type of violation divided by the number of claim files with exposure for the same specific type of violation selected for audit at the adjusting location.

Section 10100.2(w) amends the definition of “general business practice” by limiting the definition to the purposes of Labor Code section 129.5(e).

Section 10100.2(x) amends the definition of “indemnity claim” to include the payment of a temporary partial disability indemnity or a vocational rehabilitation maintenance allowance.

Section 10100.2(y) sets forth the definition of “indemnity payment.” The term is defined as compensation for any of the following benefits: temporary disability indemnity, including temporary partial disability indemnity, or salary continuation in lieu of temporary disability indemnity, permanent disability indemnity, death benefits, or vocational rehabilitation maintenance allowance. An indemnity payment includes any increase made pursuant to Labor Code section 4650(d), and any interest pursuant to Labor Code section 5800.

Section 10100.2(cc) amends the definition of “knowingly committed” to provide that one must act with knowledge of the facts of the conduct subject to an investigation and/or audit under Labor Code sections 129 and 129.5. The subdivision is further amended by removing the presumption and providing that a corporation has knowledge of facts any employee receives while acting within the scope of his or her authority and has knowledge of information contained in its records and of the actions of its employees performed in the course of employment. The subdivision is further amended to provide that an employer or insurer has knowledge of information contained in the records of its third party administrator and of the actions of the employees of the third party administrator performed in the scope and course of employment.

Section 10100.2(dd) sets forth the definition of “lawful delay.” The term is defined as a delay permitted by law or regulation, and for which the claims administrator has given a proper and timely notice of delay when such a notice is required. Any other delay is an unlawful delay.

Section 10100.2(ee) sets forth the definition of “local management.” The term is defined as claims personnel, regardless of their job titles, who have supervisory authority at an adjusting location over claims administration.

Section 10100.2(ff) amends the definition of “medical only claim” to include work injury claims for which no indemnity benefits would reasonably be anticipated or expected to be paid.

Section 10100.2(gg) sets forth the definition of “nontransferable training voucher.” The term is defined as a document provided to an employee that allows the employee to enroll in an education-related training or skills enhancement. The document shall include all necessary information as set forth in Labor Code section 4658.5 and California Code of Regulations, title 8, Section 10133.50 et seq.

Section 10100.2(kk) sets for the definition of “performance standard.” The term is defined as criteria developed from historical audit findings data and used as a basis for judgment of quality, quantity, level, and grade to measure claim adjusting performance in the handling of the workers’ compensation benefit areas set forth in California Code of Regulations, title 8, Section 10107.1, subdivision (c)(3)(A). Standard rating factors to be applied will be calculated annually and based on all final audit findings as published in the Annual DWC Audit Reports over the three calendar years before the year preceding the current audit. Performance standards for profile audit reviews and full compliance audits will be published for audits conducted the following year.

Section 10100.2(ll) sets forth the definition of “random sample.” For the purpose of audit or investigation, a random sample is a selection of claim files selected for audit pursuant to California Code of Regulations, title 8, section 10107.1, subdivisions (c)(1), (d)(1) or (e)(1). A random sample may also include companion claim files, additional claim files, or complaint claim files.

Section 10100.2(mm) amends the definition of “record of payment” to include, as part of provision accounting for the payment of medical treatment, the number of the check providing payment for a medical bill, the date of the check, and the amount paid.

Section 10100.2(oo) sets forth the definition of “Supplemental Job Displacement Benefit.” The term is defined as an educational retraining or skills enhancement allowance for injured employees whose employers are unable to provide work consistent with the requirements of Labor Code section 4658.5 and California Code of Regulations, title 8, section 10133.50 et seq.

Section 10100.2(rr) sets forth the definition of “Workers’ Compensation Information System (WCIS).” The term is defined as the workers’ compensation information system established pursuant to Labor Code sections 138.6 and 138.7.

2. Section 10101.1 - Claim File--Contents

This section sets forth the required contents of a claim file. A claim file must be maintained by a claims administrator for each work-injury claim. Non-substantive citation changes are made to the section for consistency.

Section 10101.1 is amended to provide that all open claim files shall be maintained at the adjusting location responsible for administering the claim.

Section 10101.1(c) is amended to provide that correspondence sent to the Division of Workers' Compensation must be maintained in a claim file.

Section 10101.1(i) is amended to provide that supplemental job disability benefit notices, and forms related to the Qualified Medical Evaluation or Agreed Medical Evaluator process, must be maintained in a claim file.

Section 10101.1(k) is amended to provide that correspondence, whether stored on paper or in electronic form and including correspondence to or from any individual or entity, related to the provision, delay, or denial of benefits, must be included in a claim file.

Section 10101.1(l) is added to provide that notes, correspondence, and documentation, whether stored on paper or in electronic form and including correspondence to or from any individual or entity, related to any utilization review process conducted under Labor Code section 4610, must be included in a claim file.

Section 10101.1(m) is added to provide that notes correspondence, and documentation, whether stored on paper or in electronic form and including correspondence to or from any individual or entity, related to a return to regular, modified, or alternative work as defined by Labor Code section 4658.1, must be included in a claim file.

Section 10101.1(n) is re-lettered and amended to provide that correspondence, and documentation, whether stored on paper or in electronic form and including correspondence to or from any individual or entity, evidencing the legal, factual, or medical basis for non-payment or delay in payment of compensation benefits or expenses, must be included in a claim file.

Section 10101.1(o) is re-lettered and amended to provide that notes and documentation, whether stored on paper or in electronic form and including correspondence to or from any individual or entity, describing telephone conversations relating to the claim which are of significance to claims handling, including the dates of calls, substance of calls, and identification of parties to the calls, must be included in a claim file.

Section 10101.1(p) is added to provide that for injuries reported on or after January 1, 2009, each claims administrator shall maintain a claim file for each indemnity and medical-only claim, including denied claims, and shall ensure that each file is complete and current for each claim. The section further provides that the contents of claim files may be in hard copy, in electronic form, or some combination of hard copy and electronic form. Files maintained in hard copy shall be in chronological order with the most recently dated documents on top, or subdivided into sections such as medical reports, benefit notices, correspondence, claim notes, and vocational rehabilitation. Files or portions of files maintained in electronic form shall be easily retrievable.

3. Section 10103.2 - Claim Log--Contents and Maintenance

This section sets forth the required contents of a claim log. A claims administrator must maintain an annual claim log listing all work-injury claims, open and closed.

Section 10103.2(b)(4) is amended to provide that a claim log, when indicating whether a claim is an indemnity or medical-only claim, must differentiate indemnity claims with indemnity payments from indemnity claims with no indemnity payments.

Section 10103.2(b)(7) is amended to provide that if a claim has been transferred from one adjusting location to another, the address of the new location must be identified on the initial adjusting location's claim log along with the date of transfer. Transferred claims must be listed on the claim log of the new adjusting location for the year in which the claim was initially reported, not for the year in which the claim was transferred. The claim log shall also indicate the address of the old adjusting location along with the date of transfer.

4. Section 10104 - Annual Report of Inventory

This section mandates that every claims administrator must maintain and file an annual report of inventory for each adjusting location. Reports due on or after April 1, 2003 report, as of the preceding January 1, the numbers of indemnity, denied, and medical-only claims reported to the claims administrator during the preceding calendar year.

Section 10104(a) is amended to provide that the annual report of inventory for a public self insured employer must be based on a calendar year and not a fiscal year. The subdivision is further amended to provide that the annual report of inventory must differentiate between indemnity claims with indemnity payments and indemnity claims with no indemnity payments.

Section 10104(b) is added to provide that a claims administrator must give written notice to the Audit Unit within 45 days of relocating, opening a new adjusting location, closing an adjusting location, changing contact persons, changing the e-mail address, changing from TPA-administered to self-administered or from self-administered to TPA-administered, or changing from self-insured to insured.

Section 10104(c) is added to provide that adjusting locations that have no indemnity, denied, or medical-only claims reported during the preceding calendar year must file with the Administrative Director a statement indicating whether the location is actively adjusting workers' compensation claims. The statement, which shall be filed annually by April 1, shall contain the name, address, and telephone number of the adjusting location and the name and title of the person responsible for audit coordination.

Section 10104(d)(1) is added to provide that a claims administrator's obligation to submit an Annual Report of Inventory is waived upon a determination by the Administrative Director that the claims administrator is in compliance with the electronic data reporting requirements of the Workers' Compensation Information System, as set forth in California Code of Regulations, title 8, section 9702.

Section 10104(d)(2) is added to provide that each claims administrator whose obligation to submit an Annual Report of Inventory is waived based on accurate reporting to the Workers' Compensation Information System shall maintain and file with the Administrative Director an Annual Report of Adjusting Locations. This report shall be filed annually by April 1 of each calendar year and shall report, as of the preceding December 31, each of the claims administrator's adjusting locations. The report shall include the name, street and mailing address, physical zip code, e-mail address, fax number, and telephone number for each adjusting location and the name, title, e-mail address, fax number and telephone number of the person responsible for audit coordination.

Section 10104(d)(3) is added to provide that a claims administrator shall notify the Administrative Director of any change in the information provided in the Annual Report of Adjusting Locations. A reportable change shall include the relocation of the claims administrator or the opening or closing of an adjusting location. The notification shall be made within 30 calendar days after the effective date of the change.

Section 10104(d) is added to provide that a waiver granted to a claims administrator based on accurate reporting to the Workers' Compensation Information System shall be rescinded if the total number of claims reported by the claims administrator to the Audit Unit in a claim log is not within one percent of the total number of claims electronically reported to the Workers' Compensation Information System for the same period of time as covered in the submitted claim log.

5. Section 10105 - Auditing, Discretion of the Administrative Director

This section provides that the Administrative Director shall audit claims administrators' claim files and claim logs at such reasonable times as he/she deems necessary. The section is amended to provide that the Administrative Director's authority is found in either Labor Code section 129 or 129.5.

6. Section 10106.1. Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection

This section sets forth the procedures for selecting an audit subject. All adjusting locations are subject to a routine audit once every five years. Target audits may be performed based on: an audit subject's prior audit results; decision or findings of the WCAB under Labor Code section 5814; credible complaints or other information indicating claims handling violations or violations subject to a civil penalty; information from the Workers' Compensation Information System; the audit subject's failure to produce a claim for the Audit Unit within 30 days of request, and the failure to pay or appeal a Notice of Compensation due issued by the Audit Unit. Non-substantive citation changes are made to the section for consistency.

Section 10106.1(c) is amended by deleting the existing introductory paragraph and replacing it with a new paragraph providing that Pursuant to Labor Code section 129(b)(2) and (b)(3), the Audit Unit shall conduct a profile review audit or full compliance audit of target audit subjects. The paragraph further provides that subdivision (c) will set forth the target audit criteria.

Section 10106.1(c)(1) is amended to provide that prior audit results pursuant to Labor Code section 129(b)(2) shall be used independently as factual information to support selection of a claims administrator for a return, target audit.

Section 10106.1(c)(1)(A) is amended to provide that an audit subject's final performance rating will be based on audit findings from all randomly selected indemnity claims, denied claims, and other claims as expressly identified in California Code of Regulations, title 8, section 10107.1(c)(1), (d)(1), and (e)(1).

Section 10106.1(c)(1)(B) is amended to provide that an audit subject's performance rating will be compared against the worst 10% of performance ratings for all audits conducted in the three calendar years before the year preceding the year in which the current audit was commenced.

Section 10106.1(c)(1)(C) is amended to delete the sentence: "The return target audit shall be conducted in addition to any penalties assessed as a result of the qualifying audit."

Section 10106.1(c)(2)(A) is amended to provide that the Division of Workers' Compensation will submit to the Audit Unit reports of Workers' Compensation Appeals Board (WCAB) cases involving Labor Code section 5814 violations.

Section 10106.1(c)(2)(B) is amended to delete the opening phrase "Approximately once per year".

Section 10106.1(c)(2)(D), providing that the Audit Unit shall send the audit subject selected for target audit a Notice of Audit in accordance with §10107.1(a), is deleted.

Section 10106.1(c)(3) is amended to provide that the Audit Unit may contact a claims administrator and request information necessary to determine the validity of a complaint. The subsequent phrase in the next sentence, "Approximately once per year," is deleted.

Section 10106.1(c)(3)(A) is re-lettered. The provision requiring the Audit Unit to send the audit subject selected for target audit a Notice of Audit in accordance with §10107.1(a), is deleted.

Section 10106.1(c)(3)(B) is re-lettered. The provision requiring the Audit Unit to send the audit subject selected for target audit a Notice of Audit in accordance with §10107.1(a), is deleted.

Section 10106.1(c)(5)(C) is added to provide that a target audit may be based on a claims administrator's failure to comply with the requirements and timelines of the Workers' Compensation Information System.

Section 10106.1(c)(5)(D) is added to provide that a target audit may be based on the assessment of or a stipulation to a civil penalty pursuant to Labor Code section 129.5(e).

Section 10106.1(d)(1) is added to provide that for target audits conducted in accordance with the target audit criteria, the Audit Unit shall send the audit subject selected for target audit a Notice of Audit in accordance with section 10107.1(a).

Section 10106.1(d)(2) is re-numbered and amended to provide that for target audits the Audit Unit may randomly select claims pursuant to section 10107.1 and/or target claims on the basis that the Audit Unit has received information alleging the existence of an improper claim handling practice, and for the purpose of determining whether that practice occurred in those files. Companion claim files or additional claim files may be included for audit with the selected files.

Section 10106.1(d)(3) is re-numbered and amended to provide that for all types of target audits the Audit Unit may audit only those parts of the claim file that pertain to the alleged unlawful claims handling practice.

7. Section 10106.5 - Civil Penalty Investigation

This amended section authorizes the Audit Unit to conduct an investigation or audit under Labor Code sections 129 and 129.5 when it has information indicating the possible existence of claims handling practices which would be subject to an assessment as a civil penalty under Labor Code section 129.5(e). Non-substantive citation changes are made for consistency.

8. Section 10107.1 - Notice of Audit; Claim File Selection; Production of Claim Files; Auditing Procedure.

This section sets forth the procedures for conducting Profile Audit Reviews (PAR) and Full Compliance Audits (FCA), which includes the noticing of audits and sampling methodologies for selecting claims files for audit. The section further sets forth the method for determining an audit subject's profile audit review performance rating; an audit subject whose rating fails to meet or exceed the worst 20% of performance ratings based on all final audit findings over the three calendar years before the year preceding the current audit will be subject to a FCA and administrative penalties for unpaid and late compensation. An audit subject whose rating following a FCA fails to meet or exceed the rating of the worst 10% of performance ratings for all final audit reports issued over the three calendar years before the year preceding the current audit is subject to the full schedule of administrative penalties for all violations. Non-substantive citation changes are made to the section for consistency.

Section 10107.1(a) is amended to provide that only one copy of the requested claim log or logs may be provided within 14 days by the claims administrator when provided via electronic submission to the Audit Unit mailbox at DWCAuditUnit@dir.ca.gov.

Section 10107.1(b) is amended to provide that claims selected for audit that are administered at the home of a telecommuting adjuster must be presented for audit at a California office location of the administrator, at a California location of the self insured employer, an Audit Unit office, or a Workers' Compensation Appeals Board district office. Other arrangements may be made as agreed between the audit subject and the Audit Unit.

Section 10107.1(c) is amended to provide that claim samples randomly selected under this subdivision shall not include claims with a single indemnity payment that cannot be classified under the profile audit review performance standards set forth in subdivision (c)(3)(A) through (C)(3)(E).

Section 10107.1(c)(2) is amended to provide that in addition to the randomly selected indemnity claims, the Audit Unit may audit any claims for which it has received a complaint or information over the past three years that indicate a failure to pay indemnity. The section is also amended to provide that claims with complaints that are randomly selected will be audited as part of the random sample and included in the performance rating. This section is further amended to provide that complaints other than a failure to pay indemnity will be provided to the audit subject for review and corrective action, if warranted.

Section 10107(c)(3)(A)(i-a), regarding the calculation of an audit subject's profile audit review performance rating, is amended to specify that "the failure to pay indemnity" is that set forth in section 10111.2, subdivisions (a)(1), (a)(2), (a)(3), (a)(4), and (a)(10). Further the section is amended to delete the unnecessary phrase, "whether paid or not".

Section 10107(c)(3)(A)(1), regarding the calculation of an audit subject's profile audit review performance rating, is renumbered and amended to identify the regulatory sections involving the failure to pay indemnity - California Code of Regulations, title 8, section 10111.2, subdivisions (a)(1), (a)(2), (a)(3), (a)(4), and (a)(10) – and to delete the unnecessary phrase, “whether paid or not”.

Section 10107(c)(3)(A)(2) is renumbered and amended to delete the unnecessary phrase, “whether paid or not”.

Section 10107(c)(3)(A)(3) is renumbered and amended to provide that the severity rate will be calculated based on an average amount of unpaid indemnity per randomly selected audited claim for all audit subjects for the three calendar years before the year preceding the year in which the current was commenced.

Section 10107(c)(3)(B), regarding the calculation of an audit subject's profile audit review performance rating, is re-lettered and amended to identify the regulations establishing violations for the late first payment of temporary disability indemnity payments, and in cases involving salary continuation, identify the regulation establishing the violation for a failure to comply with the requirements for first notices advising the injured employee of the provision of salary continuation in lieu of first temporary disability payments (under proposed section 10111.2, subdivisions (b)(8)(B) and (b)(8)(C)). The section is further amended to provide that in calculating the factor, the number of cases with violations will be divided by the number of randomly selected claims in which temporary disability payments or first notices advising the injured employee of the provision of salary continuation in lieu of first temporary disability notices were issued. The section is further amended to provide that in any claim involving the payment of both salary continuation in lieu of first temporary disability payments and temporary disability payments, each benefit type paid will be considered in the calculation.

Section 10107(c)(3)(C), regarding the calculation of an audit subject's profile audit review performance rating, is re-lettered and amended to specify that the late first payment of permanent disability indemnity, vocational rehabilitation maintenance allowance, and death benefits is that pursuant to section 10111.2, subdivisions (a)(6), (a)(7), (a)(8), and (a)(10).

Section 10107(c)(3)(D), regarding the calculation of an audit subject's profile audit review performance rating, is re-lettered and amended to specify that the late subsequent indemnity payments are those pursuant to section 10111.2, subdivisions (a)(8), (a)(9), and (a)(10).

Section 10107(c)(3)(E), regarding the calculation of an audit subject's profile audit review performance rating, is re-lettered and amended to provide that the failure to comply with the requirements for notices advising injured workers of potential eligibility for vocational rehabilitation applies to injured workers with injuries prior to January 1, 2004; the requirements for notices advising injured workers of the right to the supplemental job displacement benefits applies to injured workers with injuries on or after January 1, 2004. The section is further amended to provide that the notice factor will be determined by dividing the numbers of randomly selected claims with violations involving the failure to comply with the applicable requirement to issue the notices by the numbers of randomly selected claims with the requirement to issue the notices.

Section 10107(c)(4) is re-numbered and amended to provide that the Audit Unit will issue Notices of Compensation Due but will assess no administrative penalties if the audit subject's profile audit review performance rating meets or exceeds the worst 20% of performance ratings for all final audit reports issued for audits commenced in the three calendar years before the year preceding the year in which the current audit was commenced.

Section 10107(c)(5) is renumbered and amended to provide that the Audit Unit will conduct a Full Compliance Audit by randomly selecting and auditing an additional sample of indemnity claims under subdivision (d) if audit subject's profile audit review performance rating fails to meet or exceed the rating of the worst 20% of performance ratings for all final audit reports issued for audits commenced in the three calendar years before the year preceding the year in which the current audit was commenced. The section is further amended to provide that the Audit Unit will complete the FCA unless the audit subject, within two working days of the receipt of the rating, demonstrates that the factual basis for the Audit Unit's calculation of the profile audit review performance rating is incorrect.

Section 10107(d)(2) is amended to provide that in addition to the randomly selected indemnity claims, the Audit Unit may audit any claims for which it has received a complaint or information over the past three years that indicate a failure to pay indemnity or late-paid indemnity. The subdivision is further amended to provide that complaints other than a failure to pay indemnity or late-paid indemnity will be provided to the audit subject for review and corrective action, if warranted.

Section 10107(d)(3)(B) is amended to provide that the Audit Unit will issue Notices of Compensation Due and will assess administrative penalties only for violations involving unpaid and late paid compensation, if the audit subject's full compliance audit performance rating meets or exceeds the worst 10% of performance ratings for all final audit reports issued for audits commenced in the three calendar years before the year preceding the year in which the current audit was commenced.

Section 10107(e) is amended to provide that the Audit Unit will audit all claims selected for audit, in addition to a sample of denied claims, for all violations if audit subject's full compliance audit performance rating fails to meet or exceed the rating of the worst 10% of performance ratings for all final audit reports issued for audits commenced in the three calendar years before the year preceding the year in which the current audit was commenced. The subdivision is further amended to provide that notification of the Audit Unit's findings from the full compliance audit, the calculation of the full compliance audit performance rating, and intent to audit a sample of denied claims and assess penalties pursuant to Labor Code section 129.5(c)(3), will be provided to the audit subject in time for the timely filing of an objection. The subdivision is further amended to provide that the Audit Unit will complete the FCA unless the audit subject demonstrates either within two working days of the receipt of the rating, or at the meet and confer audit review conference, that it met or exceeded the FCA performance standard.

Section 10107(e)(2) is amended to provide that, in addition to the random samples of indemnity and denied claim, the Audit Unit may select for audit all claims, including their companion claims, for which complaints or information have been received over the past three years indicating the possible existence of any claims handling violation.

Section 10107(f) is amended to provide that if any additional requested documentation is not provided within thirty days of receipt of the report, additional audit penalties may be assessed under section 10111.2(b)(23).

Section 10107(h) is amended to provide that claim files selected for audit will include but not be limited to the required contents of California Code of Regulations, title 8, section 10101.1. The section is further amended to provide that if a claim file is maintained in an electronic or other non-paper storage medium, the claims administrator shall provide, at the Audit Unit's discretion, either direct computer access to the files or paper copies of the claim files. The section is also amended to provide that if a claim file selected for audit is transferred to a different adjusting location after the issuance of the Notice of Audit Commencement the file shall be produced within five working days following the request.

Section 10107(j) is amended to provide that if the Audit Unit determines that the workspace provided by the audit subject is not adequate, safe and healthful, and allows a reasonable degree of privacy, the Audit Unit may require the audit subject to deliver the files to another California office location of the audit subject, an Audit Unit office, or a Workers' Compensation Appeals Board district office, for completion of the audit. Other arrangements may be made as agreed between the audit subject and the Audit Unit.

Section 10107(m) is amended to provide that the audit subject shall provide any requested documentation or other information within ten days from the Audit Unit's request, unless the Audit Unit extends the time for good cause.

9. Section 10108 - Audit Violations--General Rules

This section sets forth the general rules that apply to audits under Labor Code sections 129 and 129.5. Non-substantive citation changes are made to the section for consistency.

Section 10108(c) is amended and subdivided. Amended Section 10108(c)(1) is added to provide that a claims administrator will be accountable for a failure to perform a required act even though the failure was remedied prior to the receipt of the Notice of Audit Commencement, when the claims administrator was notified that the claim was selected for audit. The subdivision restates that the penalty for an unlawful delay of more than 30 days in performing an act is the same as the penalty for not performing the act. The section further provides that the penalty assessed under this subdivision will be mitigated for good faith because the act, though late, was eventually performed.

Section 10108(c)(2) is added to provide that a claims administrator will be accountable for a failure to perform a required act even though the failure was remedied only after receipt of the Notice of Audit Commencement. The subdivision restates that in cases where there is an unlawful delay of more than 30 days in performing an act and the act was performed only after the audit subject was notified that the claim was selected for audit, violations will be calculated as though there was a failure to perform the act rather than late performance of the act. The subdivision further provides that there will be no mitigation for good faith if the act was performed after notification to the audit subject that the claim was selected for audit. Finally, the provision describing a "lawful delay" is deleted.

Section 10108(d) is amended to provide that penalties shall be issued, regardless of whether a Notice of Delay has issued, for the failure to pay or object timely to medical treatment bills authorized under Labor Code section 5402(c), or failure to pay or object to medical treatment bills in accordance with Labor Code section 4603.2, or failure to object to or pay bills for medical legal expense in accordance with Labor Code section 4620. Citations to regulatory authority, California Code of Regulations sections 9792.5 and 9794 have been deleted.

Section 10108(f) is amended to delete the option of paying 34 cents per mile in mileage fees related to medical treatment or evaluation.

Section 10108(g) is amended to provide that the failure, delay, or refusal to pay compensation benefits or expenses shall be subject to the applicable penalties under section 10111, or section 10111.1, or section 10111.2.

Section 10108(h) is amended to provide that the Audit Unit will not assess penalties for violations of failure to make payment of indemnity due if the total indemnity is less than twenty-five dollars (\$25.00) aggregate per claim. The subdivision is further amended to expressly provide that although penalties may not be assessed, the audit subject is still required to pay all indemnity owed.

Section 10108(j) is amended to expressly provide that the Audit Unit may, if necessary to ascertain benefits, add a companion or master claim to the random sample.

Section 10108(m) is amended to substitute “audit subject” for “claims administrator”.

10. Section 10109 - Duty to Conduct Investigation; Duty of Good Faith

This section requires claims administrators to conduct a reasonable and timely investigation of workers compensation claims.

Section 10109(d) is amended to require that investigation documentation be retained in the claim file and available for audit review.

11. Section 10111.1 - Schedule of Administrative Penalties for Injuries on or After January 1, 1994.

This section sets forth the schedule of administrative penalties for injuries occurring on or after January 1, 1994, subject to any applicable mitigation or exacerbation as allowed under subdivision (e) of this section. The word “subdivision” as used in the section is deleted and substituted by the word “subsection.” The word “section,” capitalized in the existing regulation, is changed to lowercase. Non-substantive citation changes are made for consistency.

Section 10111.1(a)(9) is amended by replacing the phrase “within 60 days of receipt” with “in the manner required by Labor Code section 4603.2”.

Section 10111.1(a)(10) is amended by replacing the phrase “within 60 days of receipt” with “in the manner required by Labor Code section 4603.2”.

Section 10111.1(b)(3) is amended to replace “Industrial Medical Council” with “DWC Medical Unit”.

12. Section 10111.2 - Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule.

This section sets forth the full compliance audit penalty schedule. Subdivision (a) establishes penalties for audit subject that fail to meet or exceed the profile audit review performance standards calculated pursuant to section 10107.1(c)(3) but meet or exceed the full compliance audit performance standards calculated pursuant to section 10107.1(d)(3). Subdivision (b) establishes penalties for audit subjects that fail to meet or exceed the full compliance audit performance standards calculated pursuant to section 10107.1(d)(3). Subdivision (c) sets forth the factors that allow for the mitigation of penalties. In general, the section is amended to substitute “subdivision” for “subsection.” Non-substantive citation changes are made to the section for consistency.

Section 10111.2(a)(9) is amended to reflect that existing section 10100.2(y) is being re-lettered to become section 10100.2(hh).

Section 10111.2(a)(10) is amended to provide that penalty amounts assessed pursuant to subdivisions (a)(1) through (a)(9) will be increased by up to 100%, but will not exceed \$5000 except as provided by Labor Code section 129.5(c)(3), if the failure to pay or late payment was in violation of an award or order of the Workers’ Compensation Appeals Board, the Rehabilitation Unit, or the Administrative Director. The subdivision is further amended to provide that when the award or order is not specific to, but only stated as a lump sum, of any benefit pursuant to subdivisions (a)(1) through (a)(9), or is for any other benefit or medical expenses, the penalty

amount of up to 100% as specified above shall be determined based on the equivalent amount of unpaid indemnity as assessed under subdivision (a)(2). The subdivision is further amended to provide that penalties will be assessed separately for both late compliance and/or the failure to pay any portion of an award or order.

Section 10111.2(a)(11) is amended to provide that penalties will be assessed for failure to pay, or late or partial payment of, a Notice of Compensation Due issued as a result of an audit pursuant to Labor Code section 129(b).

Section 10111.2(b)(2) is amended by deleting the phrase “an incomplete investigation of” and replacing it with “a reasonable attempt to investigate”.

Section 10111.2(b)(3) is amended to correct the citation that sets forth the requirement to produce a legible paper copy. The correct citation is California Code of Regulations, title 8, section 10107.1(h). The subdivision is further amended to reduce the number of days for each graduated penalties to apply for the failure to produce a paper copy of the claim file. (\$100 if the file was produced not more than 2 days late; \$250 if the file was produced more than 2 but not more than 4 days late; \$500 if the file was produced more than 4 but not more than 7 days late; \$1,000 if the file was produced more than 7 days late but not more than 15 days late; \$2,500 if the file was produced more than 15 days late but not more than 30 days late; \$5000 if the file was produced more than 30 days late or was not produced.)

Section 10111.2(b)(5) is amended to provide that graduated penalties apply for each failure to object to or pay reimbursement for the reasonable expense incurred for self-procured medical treatment to the injured worker in the manner required by Labor Code section 4603.2. The 60-day timeframe for objecting to a request for reimbursement and the subsequent reference to Labor Code section 4600 are deleted.

Section 10111.2(b)(8)(A) is re-lettered.

Section 10111.2(b)(8)(B) is re-lettered and amended to include a notice of benefits as required by California Code of Regulations, title 8, beginning with section 10133.50. The subdivision is further amended to provide that its stated penalty for each failure to issue a penalty notice will apply unless penalties are assessed pursuant to subdivisions (b)(14) through (b)(20) and (b)(27).

Section 10111.2(b)(8)(C) is re-lettered and amended to include a notice of benefits as required by California Code of Regulations, title 8, beginning with section 10133.50. The subdivision is further amended to provide that its stated penalty for each failure to timely issue a penalty notice will apply unless penalties are assessed pursuant to subdivisions (b)(14) through (b)(20) and (b)(27). The subdivision is further amended to include the supplemental job displacement benefit notice among other required benefit notices.

Section 10111.2(b)(8)(D) is re-lettered and amended to exclude a materially misleading or materially inaccurate or incomplete denial notice assessed under subdivision (b)(21) from the penalty assessed under this subdivision. The subdivision is further amended to include a notice of benefits as required by California Code of Regulations, title 8, beginning with section 10133.50.

Section 10111.2(b)(8)(E) is re-lettered.

Section 10111.2(b)(8)(F) is re-lettered.

Section 10111.2(b)(9) is amended to provide that graduated penalties apply for each failure to pay or object to a billing for a medical-legal expense in the manner required by Labor Code

section 4622. The regulatory citation to section 9794 and 60-day timeframe to pay or object to a billing are deleted.

Section 10111.2(b)(10) is amended to provide that a bill for medical treatment provided or authorized by the treating physician includes early medical treatment when a claim has not been accepted or denied pursuant to Labor Code section 5402. The subdivision is further amended to provide that any penalty assessed under the subdivision shall be doubled if the medical treatment provided by the physician was authorized by a physician reviewer through a utilization review process established under Labor Code section 4610 and Title 8, California Code of Regulations, section 9792.7.

Section 10111.2(b)(11) is amended to provide that a bill for medical treatment includes a bill for medical treatment provided pursuant to Labor Code section 5402(c). The subdivision is further amended by deleting all references to a 10% increase. The subdivision is finally amended to provide any penalty assessed under the subdivision will be no greater than the penalty that would have issued under section 10111.2(b)(10) had the bill been unpaid at the time the audit subject was notified that the claim was selected for audit.

Section 10111.2(b)(13) is amended to provide a \$50 penalty for each misdesignation of an indemnity claim as a medical-only claim on the claim log. The subdivision is further amended to provide a \$50 penalty for each failure to distinguish on the claim log an indemnity claim that has no payment of indemnity from one that has indemnity payment(s).

Section 10111.2(b)(15) is amended to substitute “DWC Medical Unit” for “Industrial Medical Council.”

Section 10111.2(b)(23) is amended to provide that graduated penalties apply for each failure to comply with, show good cause for non-compliance with, or contest, within 30 days of receipt, any written request or order of the Administrative Director or Audit Unit which is not specified in subdivisions (a)(10), (a)(12), (b)(3), (b)(13), or (b)(24) of section 10111.2. The citation to subdivision (b)(14) is deleted.

Section 10111.2(b)(24) is amended to provide that graduated penalties apply for each failure to fully and/or timely comply with any final award or order of the Workers' Compensation Appeals Board, or the Rehabilitation Unit, or Administrative Director, which is not assessed pursuant to section 10111.2(a)(10). The subdivision is also amended to allow a \$100 penalty for each late payment of interest required pursuant to Labor Code section 5800, and a \$250 penalty for each failure to pay interest required pursuant to Labor Code section 5800. A \$500 penalty is allowed for compliance (other than a late interest payment) in more than 20 but not more than 35 days from the date of service. The subdivision is further amended to provide that penalties will be assessed separately for both late compliance and the failure to pay a portion of an award or order. The subdivision also sets forth the time period for compliance after which penalties will apply: Compliance with an award or order must be within 20 days of service of the award or order, unless the award or order expressly allows additional time, plus an additional five days for service by mail. If additional time for payment is allowed in the award or order, the penalties set forth under this subdivision will be assessed based on the date the payment is ordered due instead of the date of service.

Section 10111.2(b)(25) is amended to provide a \$100 penalty if the claim form provided to the injured worker is not the current form required by regulations.

Section 10111.2(b)(26) is amended to delete the \$100 penalty for each period of 1 to 14 days' delay in filing the Annual Report of Inventory to a maximum penalty of \$500 for each Annual Report of Inventory. The subdivision is further amended to allow a \$100 penalty if the Annual Report of Inventory or Annual Report of Adjusting Locations was filed not more than 10 days

late, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$500 if the Annual Report of Inventory or Annual Report of Adjusting Locations was filed more than 40 days late, and \$1,000 if the Annual Report of Inventory or Annual Report of Adjusting Locations was overdue more than 40 days and was not filed at the time the audit subject was notified that the claim was selected for audit.

Section 10111.2(b)(27) is added to provide graduated penalties for each failure to comply with the Supplemental Job Displacement Benefit notice requirements of Section 10133.51. A penalty of \$100 is assessed for each materially incomplete or inaccurate notice relating to the supplemental job disability benefit, and, separately, the failure to send the notice by certified mail. Penalties ranging from \$100 to \$500 are assessed for each failure to issue the notice of supplemental job displacement benefits (if not previously issued) within 10 days of the last payment of temporary disability (from 10 to 40 days late).

Section 10111.2(b)(28) is added to provide graduated penalties for each failure to issue the voucher for education-related retraining/skill enhancement in compliance with California Code of Regulations, title 8, section 10133.56(c), unless the employer meets the conditions set forth in Labor Code section 4658.6. Penalties ranging from \$100 to \$1,000 are assessed for the late issuance of the voucher (from 10 to 51 days late).

Section 10111.2(b)(29) is added to provide graduated penalties for each failure to pay any properly documented Supplemental Job Displacement Benefit voucher billing within the time frames required by section 10133.56(h). Penalties ranging from \$100 to \$5,000 are assessed for each failure, the amount of the penalty dependant on the amount of the bill.

Section 10111.2(b)(30) is added to provide that for claims reported on or after April 19, 2004, regardless of the date of injury, the penalty for each failure to timely advise the injured worker of their right to medical treatment under Labor Code section 5402(c) is \$2,500.

Section 10111.2(c)(2) is amended to provide that administrative penalties may be mitigated for good faith in an amount greater than 20% in extraordinary circumstances, when strict application of the mitigation guideline set forth in subdivision (c) would be clearly inequitable.

Section 10111.2(c)(7) is amended to provide that consideration of penalty amounts based on the size of the audit subject location will be based on the number of indemnity claims reported at the audit subject's location for the most recent complete calendar year. The section is further amended to provide that for an audit subject location that is handling only run-off claims, the penalty amount shall be based on the number of open run-off claims and open claims that were closed at the audit subject location in the most recent complete calendar year.

13. Section 10112 - Liability for Penalty Assessments

This section, addressing liability for penalty assessments, is amended to correct the Labor Code citation, section 129.5(e), providing for the issuance of a civil penalty.

14. Section 10113.4 - Written Statement and Supporting Evidence

This section sets forth the procedures for a claims administrator to file a written statement setting forth its legal and factual basis for opposing the issuance of a civil penalty under Labor Code section 129.5(e). Subdivision (a) is amended to provide that the written statement shall only include copies of all documents and all other evidence that the claims administrator intends on introducing into evidence at the hearing. The requirement of providing a witness list is deleted.

15. Section 10113.5 - Prehearing Conference; Subject Matter; Prehearing Order

This section authorizes the Administrative Director, or his or her designee, to conduct a prehearing conference prior to a hearing on the issuance of a civil penalty under Labor Code section 129.5(e). Subdivision (a) is amended to include the exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing as matters to be considered at the prehearing conference.

16. Section 10114.2 - Affidavits

This section allows the use of witness affidavits or declarations at a civil penalty hearing instead of live testimony. The section is amended to provide that an affidavit may be used if the witness was named in a witness list exchanged either through agreement of the parties or pursuant to an order following a prehearing conference.

17. Section 10115 - Appeal of Notice of Compensation Due.

This section sets forth the general provisions for appealing a Notice of Compensation issued under California Code of Regulations, title 8, section 10110. The subdivision is amended to include a citation to California Code of Regulations, title 8, section 10952.

18. Section 10115.1 – Appeal of Notice of Penalty Assessment – Filing and Contents

This section sets forth the procedures for filing an appeal of a Notice of Penalty Assessment issued under Labor Code section 129.5(a) and (c). Subdivision (b) is amended to provide the correct Labor Code citation, section 129(d), regarding the payment of the assessed penalty if a request for a written decision or request for appeals conference is not timely filed and served.

19. Section 10115.2 - Appeal of Notice of Penalty Assessment; Conference Process and Delegation of Authority; Notice of Findings, Service

This section sets forth the procedures for an appeal conference following the filing of a Notice of Appeal of Penalty Assessment. Subdivision (l) is amended to provide the correct Labor Code citation, section 129.5(f), for the filing of a petition for writ of mandate from the Administrative Director's Notice of Findings.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.
- Adoption of this regulation will not: (1) create or eliminate jobs within the State of California; (2) create new businesses or eliminate existing businesses within the State of California; or (3) affect the expansion of businesses currently doing business in California.
- Effect on Housing Costs: None.
- Cost impacts on representative private person or business: The Administrative Director has determined that the proposed regulations will not have a significant adverse economic impact on representative private persons or directly affected businesses.

FISCAL IMPACTS

- Costs or savings to state agencies or costs/savings in federal funding to the State: None.
- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The potential costs imposed on all public agency employers by these proposed regulations, although not a benefit level increase, are not a new State mandate because the regulations apply to all employers, both public and private, and not uniquely to local governments. The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46. The potential costs imposed on all public agency employers and payors by these proposed regulations, although not a benefit level increase, are similarly not a new State mandate because the regulations apply to all employers and payors, both public and private, and not uniquely to local governments.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. (See "Local Mandate" section above.)
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed regulations do not apply to any local agency or school district. (See "Local Mandate" section above.)

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that small business will not be impacted by the amended regulations. The businesses that are subject to audit penalties for failure to comply with the workers' compensation regulations are insurers, self-insured employers (who must by regulation have substantial net worth and income) and third party administrators, all of whom do not qualify as "small business."

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present reasonable alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

The text of the draft proposed regulations was made available for pre-regulatory public comment from October 24, 2007 through November 13, 2007 through the Division's Internet website (the "DWC Forum"), as required by Government Code section 11346.45.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE/INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, proposed text of the regulations, pre-rulemaking comments and the Economic Impact Statement (Form STD 399). Also included are studies and documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of the regulations being proposed may be accessed and downloaded from the Division's website at www.dir.ca.gov. To access them, click on the "Proposed Regulations – Rulemaking" link and scroll down the list of rulemaking proceedings to find the Audit Regulations link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers' Compensation, 1515 Clay Street, 17th Floor, Oakland, California 94612, between 9:00 A.M. and 4:30 P.M., Monday through Friday. Copies of the proposed regulations, Initial Statement of Reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON FOR GENERAL QUESTIONS

Non-substantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142
E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person above is unavailable, or for questions regarding the substance of the proposed regulations, inquiries should be directed to:

George P. Parisotto
Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142
E-mail: gparisotto@dir.ca.gov

The telephone number of this contact person is (510) 286-7100.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly shown will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Division's website at www.dir.ca.gov.

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations with any final amendments will appear in title 8 of the California Code of Regulations, commencing with section 10100.2. The text of the final regulations also may be available through the website of the Office of Administrative Law at www.oal.ca.gov.